Supreme Court, U.S.
FILED
MAR 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-257

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, *et al.*,
Appellees

On Appeal from the Supreme Court of Pennsylvania

BRIEF FOR THE APPELLEES

Of Counsel:
ALLEN C. WARSHAW
DUANE MORRIS & HECKSCHER
240 N. 3rd Street
Harrisburg, PA 17108

LEROY S. ZIMMERMAN
Attorney General
SUSAN M. WOLFE
Chief Deputy Attorney General
Counsel of Record
ANDREW S. GORDON
Chief Deputy Attorney General
BRYAN E. BARBIN
MICHAEL A. ROMAN
Deputy Attorneys General
Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-1460

BEST AVAILABLE COPY

...TON, D.C. 20001

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether Pennsylvania discriminated against interstate commerce when it changed the relative tax burden between trucks registered in Pennsylvania and those registered elsewhere by imposing an Axle Tax on all trucks using Pennsylvania highways and simultaneously reducing registration fees for trucks registered in Pennsylvania where the resulting tax distribution still weighs far more heavily on Pennsylvania registered trucks than on trucks registered out-of-state?

2. Whether flat taxes, such as Pennsylvania's Axle Tax and its predecessor Marker Fee which are fairly, but not precisely, related to the provision of services to interstate commerce, violate the Commerce Clause?

3. Whether this Court should depart from long settled precedent and declare all flat taxes, whether fairly related to State services or not, invalid under the Commerce Clause?

4. Whether, even if this Court rules that the Pennsylvania Supreme Court erred as a matter of law, it should remand the matter to that court for resolution of outstanding issues of fact and State law?

TABLE OF CONTENTS

	Page
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT	1
1. Pennsylvania Highway Tax—An Overview	2
2. The Marker Fee	3
3. The Axle Tax	6
4. Pennsylvania Highway Tax—The Total Burden	8
SUMMARY OF THE ARGUMENT	10
ARGUMENT	14
I. PROPERLY VIEWED, PENNSYLVANIA'S AXLE TAX IS PART OF A TOTAL PENNSYLVANIA TAX SCHEME WHICH FAIRLY AND PROPERLY ALLOCATES THE COST OF OPERATING PENNSYLVANIA'S HIGHWAYS BETWEEN INTERSTATE AND DOMESTIC COMMERCE	14
II. THE COMMERCE CLAUSE DOES NOT PROHIBIT FLAT TAXES BUT REQUIRES ONLY THAT TAXES ON INTERSTATE COMMERCE BE FAIRLY RELATED TO THE SERVICES PROVIDED BY THE STATE	21
A. Flat Taxes On Motor Carriers May Be Fairly Related To Services Provided By The State	22
B. The Rationale Of The Flat Tax Cases Has Not Been Modified	25
C. The Axle Tax Is Fairly Related To The Services Provided By The State	27
D. The Marker Fee Was Fairly Related To The Services Provided By The State	30

TABLE OF CONTENTS—Continued

Page

III. THERE IS NO REASON FOR THIS COURT TO RECONSIDER ITS PRIOR RULINGS THAT FLAT TAXES ON INTERSTATE COMMERCE ARE CONSTITUTIONAL 31

IV. IF THIS COURT RULES THAT THE PENNSYLVANIA SUPREME COURT ERRED AS A MATTER OF LAW, IT SHOULD REMAND THE MATTER TO THAT COURT FOR FINAL DISPOSITION 35

A. Unresolved Factual And Evidentiary Issues Preclude Final Judgment In Favor Of Appellants 35

B. The Axle Tax Involves A Severability Question Properly Addressed By The State Court In The First Instance 38

C. The State Court Should Decide Whether A New Rule Against Flat Taxes Should Be Applied Prospectively Or Retroactively..... 39

CONCLUSION 42

APPENDIX 1a

TABLE OF AUTHORITIES

Cases: Page

Aero Mayflower Transit Co. v. Board of Railroad Comm'rs, 332 U.S. 495 (1947) ..... *passim*
Aero Mayflower Transit Co. v. Georgia Public Serv. Comm'n, 295 U.S. 285 (1935) ..... *passim*
Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1958) 15, 19, 32
Arkansas v. Oklahoma, No. 95 Orig. (O.T. 1984) .. 33
Armco Inc. v. Hardesty, 467 U.S. 638 (1984) 21
ATA v. Goldstein, 301 Maryland 322, 483 A.2d 47 (1984) 24
Best & Co. v. Maxwell, 311 U.S. 454 (1940) 26
Capitol Greyhound Lines v. Brice, 339 U.S. 542 (1950) ..... *passim*
Chevron Oil Co., v. Huson, 404 U.S. 97 (1971) 40
City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) 34
Clark v. Paul Gray, Inc., 306 U.S. 583 (1939) ..... *passim*
Clark v. Poor, 274 U.S. 554 (1927) 22
Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) ..... *passim*
Complete Auto Transit, Inc., v. Brady, 430 U.S. 274 (1977) ..... *passim*
Dandridge v. Williams, 397 U.S. 471 (1970) 20
Dixie Ohio Express Co. v. State Revenue Comm'r, 306 U.S. 72 (1938) 22
Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972) ..... *passim*
Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932) 39
Hendrick v. Maryland, 235 U.S. 610 (1916) 22 40
Henneford v. Silas Mason Co., 300 U.S. 577 (1937) 18
Hicklin v. Coney, 290 U.S. 169 (1933) 28, 29
J.D. Adams Manufacturing v. Storen, 304 U.S. 307 (1933) 34
Ingels v. Morf, 300 U.S. 290 (1937) 22, 25
Interstate Transit, Inc. v. Lindsey, 283 U.S. 183 (1931) 23
Kane v. New Jersey, 242 U.S. 160 (1916) 23

TABLE OF AUTHORITIES—Continued

	Page
Linkletter v. Walker, 381 U.S. 618 (1965)	39
Maryland v. Louisiana, 451 U.S. 725 (1981)	*passim*
Massachusetts v. United States, 435 U.S. 444 (1978)	24, 40
McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940)	26
Morange v. State Marine Lines, Inc., 398 U.S. 375 (1970)	34
Morf v. Bingaman, 298 U.S. 407 (1936)	22
Nippert v. Richmond, 327 U.S. 416 (1946)	26
Ohio Oil Company v. Conway, 281 U.S. 146 (1929)	15
Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887)	26
Sprout v. South Bend, 277 U.S. 163 (1928)	26
Tax Commissioners v. Jackson, 283 U.S. 527 (1930)	15
Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980)	34
Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648 (1981)	33
Westinghouse Electric Corp. v. Tully, 466 U.S. 388 (1984)	19

Statutes:

Pennsylvania Session Laws

Act 1980-68, 1980 Pa. Laws 229	4
Act 1982-234, 1982 Pa. Laws 842	*passim*

Pa. Cons. Stat. Ann.

§ 1—1925	38
§ 75—102	2
§ 75—1301 et seq.	2
§ 75—1916	3, 6
§ 75—2101	3
§ 75—2102(d)(2)	6
§ 75—9901 et seq.	6
§ 75—9905	6
§ 75—9908	6

TABLE OF AUTHORITIES—Continued

	Page
Pa. Stat. Ann.	
§ 72—503	41
§ 72—2611(d)	3
§ 72—2614.4	3
§ 72—2617 et seq.	3
Ga. L. 1931 (Ex Sess.) p. 114	28
Okl. Stat. Ann.	
§ 47—22.5(j)(k)	33
Constitution:	
Article I, Section 8, Clause 3	1
Miscellaneous:	
Hartman, Paul J., "Chapter 12, Exactions for the Use of Public Facilities and Services", Federal Limitations on State and Local Taxation. Lawyers Cooperative Publishing Co., 1981 p. 665-666	27
United States Department of Labor, Handbook of Labor Statistics 1975. Reference Edition	28
United States Department of Labor, Consumer Price Index, U.S. City Average 1975-1986	28, 29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-357

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, *et al.*,
Appellees

On Appeal from the Supreme Court of Pennsylvania

BRIEF FOR THE APPELLEES

CONSTITUTIONAL PROVISION INVOLVED

The Commerce Clause of Article I, § 8 of the United States Constitution provides that Congress shall have the power:

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

STATEMENT

Appellants challenge two Pennsylvania taxes imposed on all trucks, tractor-trailers and combinations which travel in Pennsylvania. Appellants, a trade association and interstate motor carriers which register some or all of their trucks[1] outside of Pennsylvania, claim that one

---

[1] Under State law, a "motor carrier vehicle" is defined as a "truck, truck tractor or combination having a gross weight or registered

of these statutes discriminates against interstate commerce on its face. In addition, Appellants challenge both taxes on the ground that, as flat taxes, they weigh more heavily on interstate than domestic commerce and are not fairly related to services provided interstate commerce by Pennsylvania.

Both of these taxes were declared unconstitutional by the trial court. However, both were upheld by the Pennsylvania Supreme Court. This appeal followed.

1. Pennsylvania's Highway Taxes—An Overview.

Pennsylvania serves as a corridor connecting the Northeast, Midwest and Southeast interstate highways. As a result, Pennsylvania's roads are used heavily by large tractor-trailers engaged in interstate commerce. Given this heavy traffic, and its hilly terrain and frequently severe weather conditions, Pennsylvania is required to spend enormous sums of money for the construction, maintenance and repair of its roads, bridges and tunnels. J.S. App. 2a.

Pennsylvania raises funds for road related purposes primarily by levying three types of taxes or fees on the users of its highways. The first kind of tax consists of registration fees. These fees are imposed on motor vehicles that are registered in Pennsylvania.[2] 75 Pa. Cons.

---

gross weight in excess of 17,000 pounds". 75 Pa. Cons. Stat. § 102. For purposes of this brief, that term will be used interchangeably with the terms "truck" and "tractor-trailer."

[2] Appellants purport to represent all those trucks not registered in Pennsylvania who are liable for the Marker Fee or Axle Tax. They describe themselves as "interstate commerce" and trucks registered in Pennsylvania as "intrastate commerce". For a variety of reasons discussed below, this characterization is seriously misleading. Pp. 35-37, *infra*. However, as we will also demonstrate, even if that characterization is accepted as accurate, Pennsylvania's tax scheme complies with the Commerce Clause.

Stat. § 1301 *et seq.* The amount of those fees depends on gross vehicle weight. 75 Pa. Cons. Stat. § 1916.

The second kind of tax is based on fuel consumption in the State and it is paid by all trucks travelling in Pennsylvania. This tax is collected in two ways. First, a fuel tax is imposed at a flat rate per gallon on all fuel sold in Pennsylvania. Pa. Stat. Ann. tit. 72 §§ 2611(d); 2614.4 (Purdon 1964 & Supp. 1986). In addition, trucks that do not travel at least 90% of their miles in Pennsylvania must keep track of all miles travelled in Pennsylvania and pay a fuel tax based on that mileage, but reduced by fuel tax actually paid at Pennsylvania pumps. Pa. Stat. Ann. tit. 72 § 2617 *et seq.* (Purdon 1964 & Supp. 1986).

Finally, beginning on August 18, 1980, Pennsylvania imposed a third kind of tax, a special user fee. The first of these was the Marker Fee. In 1983, that fee was reduced, but another user fee, the Axle Tax, was imposed. These taxes, too, are paid by all trucks using Pennsylvania highways. It is these special user taxes that are at issue in this appeal.

2. The Marker Fee.

From August 18, 1980, through March 31, 1983, Pennsylvania imposed a $25 "Marker Fee" as a charge for obtaining a road tax identification marker, a decal which out-of-state trucks are required to display in order to identify themselves as being subject to another tax—the Motor Carriers Road Tax.[3] 75 Pa. Cons. Stat. § 2101,

---

[3] The Motor Carriers Road Tax Act is a fuel tax on liquid fuels purchased outside of Pennsylvania, but consumed while travelling within the State. Pa. Stat. Ann. tit. 72. § 2617 *et seq.* (Purdon 1964 & Supp. 1986). J.A. 33. The tax applies equally to vehicles registered in Pennsylvania and those registered elsewhere. Appellants do not challenge the Road Tax itself.

J.S. App. 80a-81a.[4] When it was first imposed, the $25 Marker Fee was a tax imposed for the privilege of using Pennsylvania roads. J.A. 21. Approximately $5 of the $25 charge covered the administrative costs associated with the issuance of a decal. The remainder was credited to the Motor License Fund and expended for road related purposes, primarily highway maintenance and construction. J.A. 21-22, 29-30.

Act 1980-68, which imposed the Marker Fee, also raised registration fees for all Pennsylvania-based trucks. As reflected in the chart below, in the relevant weight classes (17,000 lbs. and over), the smallest increase in registration fee was $45 and the largest was $228. In every case, the increase was more than the amount of the Marker Fee.

Class	Registered Gross or Combination Weight in Pounds	Registration Fee ($) Pre-Act 1980-68	1980-68	Increase ($)
7	17,000-21,000	192	237	45
8	21,001-26,000	216	270	54
9	26,001-30,000	252	315	63
10	30,001-33,000	300	378	78
11	33,001-36,000	324	414	90
12	36,001-40,000	342	433	96
13	40,001-44,000	360	465	105
14	44,001-48,000	384	501	117
15	48,001-52,000	420	552	132
16	52,001-56,000	444	588	144
17	56,001-60,000	501	666	165
18	60,001-64,000	552	741	189
19	64,001-68,000	576	777	201
20	68,001-73,280	606	834	228

[4] Trucks registered in Pennsylvania also are subject to the Motor Carriers Road Tax and the Marker Fee, but need not display the marker decal because their Pennsylvania license plate serves the same purpose. *Ibid.*

The trial court held that, as a matter of law, the $25 Marker Fee was imposed only on trucks not registered in Pennsylvania, and that the fee therefore discriminated on its face against interstate commerce in violation of the Commerce Clause. J.S. App. 57a. It did not reach the claim that the Marker Fee also was unconstitutional because it was a flat tax not adequately related to the services provided by the Commonwealth.

The Supreme Court of Pennsylvania reversed. First, the State Supreme Court found that the trial court had misread Pennsylvania law in determining that the $25 Marker Fee was not included in the registration fees paid by Pennsylvania-registered trucks. J.S. App. 23a. Accordingly, it found that the fee was imposed equally on both Pennsylvania and out-of-state trucks. It also found that, when viewed as a whole, Pennsylvania's tax scheme imposes substantially higher taxes on Pennsylvania-registered vehicles than on those registered elsewhere and, therefore, there was no discrimination against interstate commerce. J.S. App. 24a.

The State Supreme Court then rejected the argument that the $25 fee was not fairly related to the services provided by Pennsylvania. In so doing, it relied on a long line of this Court's decisions upholding flat taxes on interstate commerce and holding that such taxes need not be calibrated exactly to services received by individual users of State facilities, so long as they are not excessive in the aggregate. Applying those principles, the State court held that the Marker Fee did not impose an excessive burden on interstate commerce in light of the substantial highway construction and maintenance, State police services and construction bond debt services which it financed, all of which benefited interstate commerce. J.S. App. 29a.

Here, Appellants do not challenge the State Supreme Court's holding that the $25 Marker Fee was imposed on both interstate and intrastate commerce. They do

challenge the court's conclusion that the tax is reasonably related to services provided by Pennsylvania.

3. The Axle Tax.

On April 1, 1983, the Pennsylvania legislature reduced the Marker Fee from $25 to $5. At the same time, it imposed the Axle Tax. The Axle Tax is an annual tax of $36 per axle imposed on almost[5] every truck which travels in Pennsylvania and has a gross weight in excess of 26,000 pounds. 75 Pa. Cons. Stat. § 9901 *et seq.*, J.S. App. 82a-86a. Rebates are available based on actual miles travelled for any covered vehicle travelling less than 2,000 miles in Pennsylvania. 75 Pa. Cons. Stat. § 9905, J.S. App. 83a.[6] Proceeds from the tax are placed in a special account dedicated to bridge rehabilitation and replacement projects. 75 Pa. Cons. Stat. § 9908, J.S. App. 85a.

Act 234 of 1982, the same Act which imposed the Axle Tax on all trucks and lowered the Marker Fee, also lowered registration fees for trucks registered in Pennsylvania. 75 Pa. Cons. Stat. § 1916, J.S. App. 86a-87a. The reduction in registration fees was generally equal in amount to the Axle Tax imposed.[7] However, taken in

---

[5] For $25, motor carriers may obtain a five-day permit allowing travel in Pennsylvania without payment of the Axle Tax. 75 Pa. Cons. Stat. § 2102(d)(2).

[6] The rebate is calculated as follows:

$$\frac{2000 - \text{actual Pennsylvania miles travelled}}{2000} \times \text{Axle Tax paid} = \text{Rebate}$$

Thus, the maximum per mile tax paid is $.09 per mile—$180 (the maximum Axle Tax) divided by 2000 miles. The average per mile rate is estimated to be much lower, approximately $.025. J.S. App. 172a.

[7] The correspondence between the registration fee and the Axle Tax imposed is not perfect. For example, trucks weighing between

combination with the increase in the registration fee which had occurred in 1980 (at the same time the $25 Marker Fee was imposed) the net effect was still an increased registration fee for most trucks registered in Pennsylvania.[8]

Since April 1983, the Axle Tax has raised over $300 million. Over the expected life of the program, Axle Tax revenues are expected to satisfy the Commonwealth's share of the funding necessary to repair and replace 979 bridges on Pennsylvania's interstate highway system—approximately $800 million. This amount will be supplemented by some $420 million in Federal aid and $40 million in local governmental expenditures. J.A. 208.

The bridge projects financed by the Axle Tax will be completed over the next five years. Of the affected bridges, 235 are located on Pennsylvania's Priority Commercial Network.[9] J.A. 228. Repair of these bridges alone will cost approximately $744 million. J.A. 228-29. Of that amount, $177 million will consist of Axle Tax revenue. *Ibid.* Approximately 70 of these 235 bridges are currently closed to heavy vehicles or closed completely. *Ibid.*

38,001 and 40,000 lbs. are required to have three axles, yet the registrations were reduced by $72 rather than the $108 Axle Tax imposed.

[8] For example, in 1980, the registration fee for a motor carrier vehicle with a gross or combination weight of 68,001-73,280 pounds increased $228. J.S. App. 7a. The 1982 decrease in the registration fee was only $144. J.S. App. 9a. Thus the total registration fee for such vehicles increased $84 after 1980. In addition, after 1982, Pennsylvania registered vehicles also paid the Axle Tax—generally $144 (4 Axles x $36) for vehicles in that weight class. J.A. 260.

[9] Pennsylvania's Priority Commercial Network consists of about 11,600 miles of roadways made up of (1) roads which carry more that 500 trucks per day and (2) connector roads of particular significance to industry. It was developed by Pennsylvania's Department of Transportation in order to identify the network of highways which is most frequently used by commercial truck traffic. J.A. 228.

The State trial court entered summary judgment for the motor carriers declaring the Axle Tax unconstitutional. The court held that the Axle Tax facially discriminated against interstate commerce because the simultaneous registration fee reductions almost always offset the Axle Tax, virtually exempting Pennsylvania trucks from the Axle Tax. J.S. App. 61a.

The Supreme Court of Pennsylvania reversed, upholding the Axle Tax. It found no discrimination against interstate commerce because, when Pennsylvania's tax scheme was viewed as a whole, intrastate commerce paid substantially higher taxes to Pennsylvania. J.S. App. 33a-34a. The court also rejected the claim that the Axle Tax is excessive or is not fairly related to the services provided by the Commonwealth. J.S. App. 34a.

4. Pennsylvania Highway Taxes—The Total Burden

In total, Pennsylvania has over a dozen highway user taxes.[10] With the exception of the registration fees, most of these taxes are facially neutral. However, when considered *in toto*, there can be no question that motor carriers registered in Pennsylvania pay a much higher price for using Pennsylvania's highways.

In this regard, Pennsylvania highway user taxes can generally be summarized as follows:

1. All Pennsylvania registered trucks pay a registration fee ranging from $39 for trucks or combinations

---

[10] Pennsylvania's highway user taxes include the following: (1) truck and truck tractor registration fees; (2) trailer registration fees; (3) truck and truck tractor title fees; (4) trailer title fees; (5) registration transfer fees; (6) special hauling permit fees; (7) fuel use tax; (8) motor carriers road tax; (9) oil company franchise tax; (10) gross receipts tax (on vehicles travelling interstate); (11) liquid fuels tax; (12) farm truck registration fees; (13) special trip permit fees. J.S. App. 2a-3a; J.A. 32.

weighing 5,000 pounds or less, to $945 for those weighing up to 80,000 pounnds.[11]

2. Trucks registered outside Pennsylvania pay a $5 Marker Fee, a fee which is included with the registration fee of trucks registered in Pennsylvania.

3. All trucks weighing more than 26,000 pounds, including those registered in Pennsylvania, pay the Axle Tax, an amount usually ranging from $72 to $180.[12]

4. All trucks pay fuel usage taxes, based either on actual fuel purchases in Pennsylvania or mileage travelled in Pennsylvania.

Under this scheme, Pennsylvania trucks start out paying a substantial registration fee. In addition, they pay all the same taxes as out-of-state trucks, with the total amount of those taxes varying only with usage for otherwise similar trucks. Obviously, if Appellants are correct that Pennsylvania-registered trucks use Pennsylvania roads more than out-of-state trucks, Pennsylvania trucks also pay much higher usage taxes. Thus, under any analysis, Pennsylvania registered trucks pay a substantially higher price for the use of Pennsylvania highways than do out-of-state trucks.

The total cost of road maintenance and repair on Pennsylvania's highways from April 1, 1981 through November 30, 1982, was approximately $1.5 billion. In addition, during the same period, the Commonwealth spent some $161 million to provide State Police patrols on Commonwealth highways. J.A. 29-30. By contrast, highway taxes and fees applicable to vehicles paying the Marker Fee generated only approximately $300 million

---

[11] As noted above, this fee was substantially increased for all trucks in 1981, but was then decreased in 1983.

[12] The registration fee for trucks in this weight range ranges from $243 to $945.

in revenues during that period. J.A. 38.[13] Thus, trucks generally, and interstate commerce in particular, pay only a small part of the cost of operating Pennsylvania's highways.

SUMMARY OF ARGUMENT

I. State legislatures have broad discretion to construct tax schemes which generate the revenues necessary to fund the services provided by the State. In so doing, a State need not construct a perfect system, but is merely required to develop a taxing scheme which is reasonable in setting its tax levels and in allocating the burden of taxation between interstate and local commerce. Within these limits, there is no question that a state may require interstate commerce to "pay its way."

Necessary to this discretion is a State's corollary power to alter or adjust its tax structure within reasonable limits, either to correct inequities in the original system, or to modify the system to properly reflect changes in economic circumstances. Change alone does not violate the Commerce Clause. Thus, a State may change either the absolute burden on interstate commerce or the relative burden on such commerce, so long as, taken as a whole, the State's taxing scheme does not discriminate against interstate commerce by providing local commerce with a competitive advantage.

The Axle Tax (and its predecessor, the Marker Fee) is but a single element of Pennsylvania's multi-tiered scheme of taxes and fees designed to finance an extensive highway system. When the tax burden is viewed in its

---

[13] Of that amount, approximately $12 million consisted of Marker Fees paid by trucks not registered in Pennsylvania, J.A. 34; $10 million came from the Motor Carriers Road tax, J.A. 34; $80 million came from registration fees for Pennsylvania registered trucks, truck-tractors and trailers, J.A. 34-35; and $131 million came from fuel taxes. J.A. 33. The remainder was derived from various other taxes and fees. J.A. 32-38.

entirety, trucks registered in Pennsylvania clearly pay a higher price for the use of Pennsylvania highways than do trucks registered in other States. Appellants do not attempt to prove otherwise. Nor do they demonstrate, in any way, that, on an aggregate basis, trucks registered outside of Pennsylvania pay more than their fair share for the use of Pennsylvania highways. The record would not support such a conclusion. Appellants, therefore, have failed to meet their burden of demonstrating that Pennsylvania's highway tax scheme discriminates against interstate commerce.

II. This Court has repeatedly upheld flat user taxes, so long as these taxes are not excessive. This test has been reaffirmed by this Court's recent decisions, and applies to Appellants' claim, whether they characterize it as a discrimination claim or as a claim that the subject taxes are not fairly related to the services provided by this State. Both the Axle Tax and the Marker Fee are clearly valid under the "fairly related" standard, since they both generate revenues related solely to the provision and maintenance of highways for use by all vehicles.

III. There is no reason for this Court to reconsider its prior rulings that flat taxes which may affect interstate commerce are constitutional. Like the highway systems they are designed to finance, State highway taxing schemes are complex and difficult to administer. Appellants have simplistically suggested that mileage based taxes are the only constitutionally acceptable way to compensate States for the provision of roads and other highway related services. This Court has recognized, however, that mileage is only one of the relevant factors in setting compensation for road use, and thus, the taxes based solely on mileage demanded by Appellants may be no more fair or accurate in practice than the flat taxes which are at issue in this case.

This Court has recognized the State's broad discretion to design its own taxing schemes. When these taxes are otherwise constitutional, they clearly cannot be stricken down simply because another alternative exists. Likewise, the actions of other States, either in constitutionally imposing similar taxes or in unconstitutionally imposing retaliatory taxes, cannot render an otherwise constitutional tax invalid.

This Court has recognized that Congress is the appropriate body to solve the problems perceived by the Appellants in these cases. This Court's consistent previous decisions finding flat fee taxes valid are entitled to considerable respect under the doctrine of stare decisis, and should not be overturned when the solution is properly legislative in nature.

IV. If this Court determines that the judgment of the Pennsylvania Supreme Court was erroneous, it should remand this case to that Court for final disposition. There are significant issues of fact and State law to be resolved before this case can be concluded.

A. Appellants' position is based on a conception of interstate commerce which assumes that all trucks registered in Pennsylvania are intrastate in nature, and those trucks registered in other States are in interstate commerce. This distinction is not, however, necessarily accurate. To the contrary, many trucks which are registered in Pennsylvania travel through other States and are owned by firms located outside the Commonwealth. These vehicles, therefore, clearly participate in "interstate commerce" in the traditional sense. Moreover, many trucks registered outside of Pennsylvania received a benefit from the decrease in Pennsylvania's registration fees because they pay part of that fee to Pennsylvania under the International Registration Plan. The benefit from the reduction in the Pennsylvania registration fee is thus not limited to Pennsylvania registered

trucks. The degree, if any, to which interstate commerce is adversely affected by the taxes at issue in this case is a determination which involves subtle questions of fact which should be resolved by the State courts.

B. An evidentiary issue remains which should be resolved by the State courts. Even if this Court accepts the Appellants' characterization of interstate commerce, and further accepts the Appellants' argument that only mileage related taxes are constitutionally acceptable, the evidentiary basis for a finding of discrimination rests entirely on a survey which is merely a compilation of out-of-court statements of its members prepared by the Appellant trade association. The admissibility of this survey was contested in the trial court, and it was admitted over objection, but not relied upon as a basis of decision. The Pennsylvania Supreme Court did not determine the admissibility of this survey. The State court should have an opportunity to resolve this issue, especially since the evidence in question is critical to Appellants' theory of unconstitutional discrimination.

C. If this Court determines that Act 234 is unconstitutional because its provisions discriminated in effect against interstate commerce, it should remand this case to the Pennsylvania Supreme Court to determine the appropriate relief. Under Pennsylvania law, statutory provisions are presumed to be severable. The State law question which remains to be determined, then, is which of the statutory provisions should be voided: the provision imposing the Axle Tax equally on all trucks, or the provision lowering the registration fees for Pennsylvania vehicles. This is clearly an issue of legislative intent most appropriately decided by the State court.

D. If this Court chooses to overrule 70 years of consistent precedent regarding the constitutionality of flat fee taxation, it must then be determined whether its ruling is to have retroactive effect, and thus require re-

funds by Pennsylvania to the Appellants. Questions of retrospective or prospective application of judicial decisions should be resolved by considering (1) the foreseeability of the new ruling; (2) whether the purpose of the new rule would be advanced by retrospective application; and, (3) the inequities which retrospective application of the new ruling might produce. These issues are best decided by the Pennsylvania courts.

If this Court retains this retroactivity issue, it is clear that the invalidation of flat fee taxation should only have prospective application. Flat taxes have been approved by this Court consistently for over 70 years. Pennsylvania and other States have predicated enormous highway projects on their ability to collect fees under their flat tax systems, and had no reason to suspect that their revenue scheme was infirm. Especially where substantial services have been provided to the Appellants through the upgrading and improvement of numerous highways and bridges, it would be inequitable to require a refund in these circumstances.

ARGUMENT

I. PROPERLY VIEWED, PENNSYLVANIA'S AXLE TAX IS PART OF A TOTAL PENNSYLVANIA TAX SCHEME WHICH FAIRLY AND PROPERLY ALLOCATES THE COSTS OF OPERATING PENNSYLVANIA'S HIGHWAYS BETWEEN INTERSTATE AND DOMESTIC COMMERCE.

Starting with the principle that taxes which apply only to interstate commerce are facially discriminatory and therefore unconstitutional, Appellants conclude that an incremental change in a taxing scheme which results in a relative increase in taxes paid by out-of-state users of State facilities is, by itself, facial discrimination. Under their analysis, a State which discovers that interstate commerce is not paying its fair share may never reallocate the relative tax burden between interstate and

intrastate commerce. Rather, having once chosen a tax structure and a distribution of tax burdens between interstate and intrastate commerce which meets the standards established by this Court, a State is frozen into that scheme forever. This, of course, cannot be the case.

To the contrary, it is now clear that interstate commerce constitutionally may be required to "pay its way" —pay its just share of the State's expenditures for services provided. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Moreover, a State legislature has broad discretion to construct a taxation scheme which generates the required revenues in the way the legislature finds wisest, within constitutional and other limits. *See, e.g., Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526 (1958); *Tax Commissioners v. Jackson*, 283 U.S. 527, 537 (1930); *Ohio Oil Co. v. Conway*, 281 U.S. 146, 159 (1929).[14] Finally, in exercising this discretion, a legislature need not be perfect, either in setting its tax levels or in allocating the tax burden between interstate and domestic commerce. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 627-628 (1981).

It follows, of course, that a State has the right to alter its tax structure within constitutional limits. Otherwise, tax schemes would remain frozen in time and would be totally unresponsive to current economic realities. For example, over time the legislature can reexamine its initial conclusions concerning tax allocations, and determine that some groups are benefiting more than originally thought and others less. Indeed, the relative

---

[14] While these cases were decided under the Fourteenth Amendment, this Court has held that:

> There is no reason to suppose that this latitude afforded the States under the Due Process Clause is somehow divested by the Commerce Clause merely because the taxed activity has some connection to interstate commerce; particularly when the tax is levied on activity conducted within the State.

Commonwealth Edison Co. v. Montana, 453 U.S. 609, 623 (1981).

benefits accruing to different groups can, in fact, change over time. In either case, rational reallocation of the tax burden would be appropriate.

The Commerce Clause does not serve to carve erroneous legislative judgments in stone forever, or to bar the legislature from changing the tax allocations to reflect changed circumstances. Yet, almost any change in a tax scheme will affect either interstate or domestic commerce and, therefore, their relative burdens. Thus, under Appellants' theory, the Commerce Clause prohibits any change which adversely affects interstate commerce.[15] To the contrary, however, in evaluating such changes, the legislature's judgment must be upheld, in the absence of a clear showing that it violates constitutional principles. *See Commonwealth Edison Co. v. Montana*, *supra*.

Clearly then, change alone cannot violate the Commerce Clause. The mere fact that, as here, a legislature has changed either the absolute burden on interstate commerce or the relative burden on such commerce in comparison with domestic commerce does not, by itself, prove a constitutional violation. Yet, Appellants here have shown no more.

This Court has never held that there is only one acceptable allocation of tax burdens between interstate and intrastate commerce. It has only held that, *taken as a whole*, a State's taxing scheme should not discriminate against interstate commerce by providing intrastate commerce with a competitive advantage. *Maryland v. Loui-*

---

[15] Otherwise, Appellants would have to concede that Pennsylvania could properly have accomplished the same result in two steps as it accomplished here in one. Specifically it could have first imposed the Axle Tax on all trucks and later reduced the registration fee. The first act would have been wholly neutral; the second would have only indirectly affected interstate commerce by changing its relative share of the tax burden. We, of course, believe that done separately these changes in the tax scheme would have been legal, just as they were when done together in Act 234.

siana, 451 U.S. 725, 754 (1981). Thus, analysis under the Commerce Clause cannot be confined solely to any incremental alteration of an existing tax scheme. *See Id.* Although Appellants consider *Maryland v. Louisiana* to be controlling (App. Br. 19), they read it too narrowly. The effect of a particular levy on interstate commerce must be evaluated together with all of the provisions of the "State's tax scheme." *Ibid.*

Thus viewed, the Axle Tax does not stand alone—it is but a small part of Pennsylvania's multi-tiered scheme of taxes and fees designed to finance an extensive highway system. Under that scheme, domestic trucks clearly pay a higher price for the use of Pennsylvania highways than those registered out-of-state. Appellants make no attempt to prove otherwise, or to demonstrate in any other way that, in the aggregate out-of-state truckers pay more than their fair share for their use of Pennsylvania highways. They do not.

Indeed, viewed in any context other than that suggested by Appellants, even the changes in Pennsylvania's tax scheme have benefited interstate commerce. Specifically, while Appellants have focused only on the changes effected by Act 234 of 1982, the totality of the changes since 1980 has resulted in higher relative and absolute taxes on trucks registered in Pennsylvania. J.A. 260. As noted, in 1980, registration fees for Pennsylvania trucks were substantially increased. The decreases effected in 1982 only partially offset the 1980 increases and were accompanied, of course, by the imposition of the Axle Tax. The Axle Tax is imposed equally on all trucks and, therefore, taken by itself, is facially neutral. Accordingly, since 1980, Pennsylvania trucks have been paying more for their use of Pennsylvania highways, both absolutely and in relation to trucks registered elsewhere.

Apparently unable to demonstrate that Pennsylvania's restructured tax scheme, viewed as a whole, unfairly

allocates the tax burden between interstate and intrastate commerce, Appellants set up a strawman and then, predictably, knock it down. Specifically, Appellants correctly argue that the Axle Tax is not a "compensatory tax" within the meaning of this Court's holdings.[16]

As they note, the compensatory tax doctrine established by this Court requires that a State demonstrate that a tax applicable only to interstate commerce is offset, in fact, by a specific tax imposed only on intrastate commerce for a substantially equivalent event, and that the result is to equalize previous unequal tax burdens. App. Br. 22. Admittedly, the Axle Tax has no specific counterpart imposed only on in-state businesses. But, the compensatory tax doctrine simply has nothing to do with a State's rational reallocation of its tax burdens.[17]

In the context of a complex and multi-tiered tax scheme, such as Pennsylvania's highway user taxes, simply balancing one tax against another serves no useful purpose. Rather, as we demonstrate above, this Court has required that complex taxes be viewed as a whole, not in isolated parts. *Maryland v. Louisiana*, *supra*. As we

---

[16] See *Henneford v. Silas Mason Co.*, 300 U.S. 577, 584 (1936).

[17] Although the State Supreme Court adverted to the compensatory tax theory (J.S. App. 33a-34a), Appellees never relied on that theory below. In fact, the State Supreme Court analyzed the taxing scheme in precisely the way we suggest in the text—it must be evaluated in its entirety, not by isolating one of its features. The compensatory tax doctrine was developed to place in proper perspective taxes which, although apparently discriminatory because they apply only to business originating outside the State, are valid nonetheless because they complement or compensate for a tax on comparable business originating within the State. By contrast, we deal here with taxes which apply to all motor carrier business regardless of origin. Registration fees do not compensate for these facially neutral taxes—they are part of the total tax scheme which must be evaluated to decide whether the burden on foreign commerce is "manifestly disproportionate." *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 599 (1939).

also demonstrate above, State legislatures have broad discretion to reallocate the tax burdens among the various persons and entities affected by such tax schemes. *Allied Stores of Ohio v. Bowers*, *supra*. The only relevant question in evaluating tax reallocations is whether the resulting tax scheme, when viewed as a whole, unfairly disadvantages interstate commerce. *Maryland v. Louisiana*, *supra*. Appellants here make no attempt to demonstrate that such is the case under Pennsylvania's system of highway user taxes. It is for this reason their challenge must fail.

Finally, having knocked down their own strawman, Appellants address our "rational reallocation" argument in only a summary fashion. The thrust of their argument is two fold. First, a legislature may not reallocate the tax burden unless it says it is doing so. Secondly, they appear to contend that Pennsylvania has the burden of proving that its reallocation is rational.

The first of these arguments exalts form over substance. If this Court holds that a State may not change its tax scheme to reallocate the tax burden under that scheme unless it explicitly says that it is doing so, that problem is easily remedied—State legislatures will assuredly make appropriate findings and Appellants will get little relief. More importantly, however, to impose that technical requirement on Pennsylvania retroactively would serve no useful purpose.[18] The purposes of the Act are clear on its face: to reallocate the tax burden and

---

[18] Appellants' reliance on *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 405-406 (1984), for the proposition that the State is required to prove that a change in the tax mix between local and interstate commerce was necessary to rectify an imbalance is misplaced. *Westinghouse Electric* involved a facially discriminatory tax credit—one which was available only to local businesses. New York did not argue that the differential credit was necessary to make interstate commerce pay its own way, instead arguing that the effect of the credit was "slight" because New York's other taxes were high. *Id.* at 405.

to fund bridge repairs. They are also irrelevant to the real question: whether the resulting tax scheme is fair. *See Maryland v. Louisiana*, *supra*.

Likewise, it would seriously undermine the broad discretion which State legislatures have to design their tax programs to impose on Pennsylvania the burden of demonstrating that an imbalance existed in its prior tax system and that the new tax redressed that imbalance. *Commonwealth Edison Co. v. Montana*, 453 U.S. at 628-29. As this Court recognized in *Commonwealth Edison*, it is not a proper judicial function "to calculate acceptable rates or levels of taxation of activities that are conceded to be legitimate subjects of taxation." *Ibid.* This is because

> [I]t is doubtful whether any legal test could adequately reflect the numerous and competing economic, geographic, demographic, social, and political considerations that must inform a decision about an acceptable rate or level of state taxation, and yet be reasonably capable of application in the wide variety of individual cases. But even apart from the difficulty of judicial undertaking, the nature of the fact finding and judgment that would be required of the courts merely reinforces the conclusion that questions about the appropriate level of state taxes must be resolved through the political process. Under our federal system, the determination is to be made by state legislatures in the first instances and, if necessary, by Congress when particular state taxes are thought to be contrary to federal interests.

Ibid. (Footnote and citations omitted).

For these reasons, a State can not be found to have violated the Commerce Clause simply because its classifications are imperfect. Rather, in the area of economics, this Court has generally required only that a State's actions have some "reasonable basis". *See Dandridge v. Williams*, 397 U.S. 471, 486 (1970). Certainly, Penn-

sylvania's taxes on highway users, viewed as a whole, meet that standard.

In any case, States do not have the burden to justify in the first instance the manner in which they have exercised their discretion. To the contrary, the burden of proof rests squarely with those who challenge the tax plan.[19] Appellants have made no effort to satisfy their burden. Nor in our view could they mount a successful challenge. Their novel claim that a particular incremental adjustment to a complex tax scheme may be evaluated in isolation must be rejected.

II. THE COMMERCE CLAUSE DOES NOT PROHIBIT FLAT TAXES BUT REQUIRES ONLY THAT TAXES ON INTERSTATE COMMERCE BE FAIRLY RELATED TO THE SERVICES PROVIDED BY THE STATE.

In what only can be described as a dramatic departure from precedent, Appellants argue (App. Br. 28-49) that flat rate taxes on interstate motor carriers are unconstitutional because the effective tax rate is higher on out-of-state trucks which use the taxing State's roads less than do in-state trucks. Their proposal is that all truck taxes be mileage-related. While this suggestion might be an appropriate legislative solution to the trucking industry's perceived difficulties, this Court never has so restricted the States' options as a matter of constitutional imperative. In fact, as we demonstrate below, the Court never has required the degree of precision in tax-

---

[19] Arguably, that burden may shift in the case of facially discriminatory taxes, those imposed only on interstate commerce. See *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984). In addition, or in the alternative, a State may have a higher standard to meet when trying to justify a facially discriminatory tax. *Ibid.* In this case, however, despite Appellants' attempts to characterize it otherwise, the Axle Tax itself is facially neutral; it is imposed equally on all trucks. Thus, it is Appellants who bear the burden of proof in challenging it.

ing schemes which Appellants advocate, and the Court repeatedly has upheld flat rate taxes on interstate motor carriers.

A. Flat Taxes On Motor Carriers May Be Fairly Related To Services Provided By The State.

The Court without exception has sustained the validity of State taxing schemes which impose flat fees on interstate motor carriers irrespective of the number of miles which they travel within the State. *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950); *Aero Mayflower Transit Co. v. Board of Railroad Commissioners*, 332 U.S. 495 (1945) (*Aero Mayflower II*); *Aero Mayflower Transit Co. v. Georgia Public Service Commission*, 295 U.S. 285 (1935) (*Aero Mayflower I*).[20] To a degree, these decisions are premised on the idea that the charge is levied not on the actual use of the roads, but upon the privilege of making such use.[21] "The fee is for the privilege for a use as extensive as the carrier wills that it shall be. There is nothing unreasonable or repressive in a burden so imposed . . . One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may." *Aero Mayflower I*, 295 U.S. at 289 (citations omitted). *Accord Aero Mayflower II*, 332 U.S. at 503-504.

The analysis was carried one step further in *Capitol Greyhound Lines, supra*, where the Court rejected a challenge to a Maryland tax based on the fair market value of vehicles used in interstate commerce. 339 U.S. at 543.

---

[20] This Court has ignored mileage and approved graduated flat fees on horsepower, *Hendrick v. Maryland*, 235 U.S. 610 (1916); on carrying capacity, *Clark v. Poor*, 274 U.S. 554 (1927); on manufacturer's rated capacity, *Dixie Ohio Express Co. v. State Revenue Comm'r*, 306 U.S. 72 (1938).

[21] It must appear that the tax in fact is for reimbursement for the cost of providing public highways. Compare *Ingels v. Morf*, 300 U.S. 290 (1937), with *Morf v. Bingaman*, 298 U.S. 407 (1936).

As the Court noted, there are "innumerable factors bearing on the fairness of compensation" required from motor carriers, [*i*]*d.* at 544 and "[i]t is clearly within the discretion of the State to determine whether the compensation for the use of its highways . . . shall be determined by way of a fee payable annually or semi-annually, or by a toll based on mileage or otherwise.'" *Id.* at 544-545 (footnote omitted), *quoting Kane v. New Jersey*, 242 U.S. 160, 168 (1916).

The Court explicitly rejected the argument that the Maryland tax was infirm because it fell "short of achieving uniformity among carriers in relation to road use." *Id.* at 546. The Court recognized that Maryland, like Pennsylvania, imposes a mileage tax on motor carriers in addition to flat fees. When the entire taxing scheme is considered "the total charge as among carriers does vary substantially with the mileage traveled." *Id.* at 546. But more importantly, the Court recognized mileage was not a talisman for curing inequities in State taxing schemes. "Complete fairness would require that a state tax formula vary with every factor affecting appropriate compensation for road use." *Id.* at 546. The insurmountable difficulties with constructing such a complex formula and the administrative burdens attendant to enforcing such a scheme persuaded the Court against requiring that level of precision. *Id.* at 546-547.

The question ultimately is whether the total amount of the taxes "is shown to be in excess of fair compensation for the privilege of using state roads." *Id.* at 547. Carriers will succeed in challenging State road taxes only if they prove that "the total [State] taxes are out of line with fair compensation due to [the State]." *Ibid. See also Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183, 186 (1931) (tax "sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways . . . .").

Lest there be some thought that this analysis is from a bygone era, it is instructive that more recently in *Evansville-Vanderburg Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), this Court unequivocably reaffirmed this line of precedent. The case involved a flat one dollar fee imposed on each passenger enplaning any commercial aircraft at Evansville Airport. The Court, in upholding the fee, held that "A state may impose a flat fee for the privilege of using its roads, without regard to the actual use by particular vehicles, so long as the fee is not excessive." *Id.* at 715. In so holding, the Court relied on *Aero Mayflower* I and II, *supra*, and *Capitol Greyhound, supra.* The Court explicitly reaffirmed its *Evansville* holding in *Massachusetts v. United States*, 435 U.S. 444 (1977) (involving a flat fee registration tax on aircraft).[22]

Appellants' claim must meet this test regardless of whether they characterize it as a discrimination claim or a claim that the taxes are not fairly related to the services provided by the State. Once Appellants concede, as they must, that Pennsylvania may impose a tax on their activity in Pennsylvania and that the taxes at issue are imposed even-handedly on interstate and intrastate commerce, the only remaining foundation for their discrimination theory is a claim that the tax burden borne by the out-of-state trucks is excessive. This is, of course, merely a variant of Appellants' assertion that these taxes do not satisfy the "fairly related" requirement. Their discrimination claim, therefore, collapses into that claim and must meet the same test. *Commonwealth Edison Co. v. Montana, supra*, 453 U.S. at 620.

---

[22] *See also, ATA v. Goldstein*, 301 Maryland 372, 483 A.2d 47 (1984) (upholding a flat highway user charge against Commerce Clause attack). In *Goldstein*, the Maryland Supreme Court rejected the taxpayer's argument that the *Complete Auto Transit* case overruled the long line of the flat fee cases.

B. The Rationale Of The Flat Tax Cases Has Not Been Modified.

Apparently conceding that Pennsylvania's truck taxes satisfy the rules announced in *Capitol Greyhound Lines* and the *Aero Mayflower* cases, Appellants argue that those cases have been undercut by *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). But what Appellants fail to appreciate is that *Complete Auto* purported to alter only the distinction between analyzing taxes labelled as "privilege" taxes and those labelled otherwise. The Court held no more than that the tests it had previously developed for analyzing non-privilege taxes should be applied regardless of the label assigned by the State. *Id.* at 278-279, 288-289. This much is evident, not only from the Court's discussion, but also from its citation to two flat fee cases, *Ingels v. Morf*, 300 U.S. 290 (1937) and *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939). *Id.* at 278, n.6.

Appellants mistakenly rely (App. Br. 31) on *Commonwealth Edison, supra*, for the proposition that all taxes must be directly proportional to the taxpayer's contact with the State. The Court, instead, was careful to distinguish between general revenue taxes (like those at issue in *Commonwealth Edison*) and "user fees" (like those challenged here). 453 U.S. at 621-622 and n. 12. With respect to user fees, which are dedicated to pay for transportation facilities, the Court referred to flat fee cases such as *Evansville-Vandenburgh Airport Authority Dist. v. Delta Airlines*, 405 U.S. 707 (1972); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); and *Ingels v. Morf*, 300 U.S. 290 (1937), as providing the appropriate rules. User fees are not entirely analogous to true taxes and, as we have detailed above, the appropriate test requires that the legislature's choice of a user fee structure be approved if the fees are not "manifestly disproportionate" to the facilities made available to interstate commerce. *Commonwealth Edison, supra*, 453 U.S. at

622, n.12, *quoting Clark v. Paul Gray, Inc.*, *supra*, 300 U.S. at 599.

Cases such as *Nippert v. Richmond*, 327 U.S. 416 (1946); *Best & Co. v. Maxwell*, 311 U.S. 354 (1940); *Sprout v. South Bend*, 277 U.S. 163 (1928); and, *Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489 (1887), all involved general revenue flat taxes.[23] Their vice was that the fees were not used to pay for facilities available and necessary for the movement of interstate commerce and they were not proportioned in any fashion based on the extent of contact between the taxing jurisdiction and foreign commerce. In fact, the Court in *Sprout* made it clear that the analysis would have been different if the fee revenue had been "applied to the construction or maintenance of the city streets." 277 U.S. at 170. Properly viewed, these cases are entirely consistent with the *Aero Mayflower* line of cases and with the distinctions drawn in *Commonwealth Edison*, *supra*.[24]

Appellants contend (App. Br. 49) nevertheless that flat taxes necessarily violate the fourth requirement identified in *Complete Auto*—that the tax must fairly relate to the services provided by the State. *Id.* at 278. But the "fair relation" requirement sounds remarkably like the test employed in the flat fee cases. The fee may not be excessive in relation to the privilege which it purchases. *See Evansville Airport v. Delta Airlines*, *supra*, 405 U.S. at 715; *Capitol Greyhound Lines v. Brice*,

---

[23] To a degree, these cases also appear to rely on the principle, now overruled by *Complete Auto*, that local governments may not lay taxes on the right of interstate merchants to "do business" within their jurisdiction.

[24] The Court itself has observed "that the rule of *Robbins v. Shelby County Taxing District*, *supra*, has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate. . . ." *McGoldrick v. Berwind-White Co.*, 309 U.S. 33, 57 (1940).

supra, 339 U.S. at 545; *Aero Mayflower II*, *supra*, 332 U.S. at 504. The Constitution requires fair relation, not mathematical precision.

It is clear, therefore, that State taxation taking the form of flat fees for the use of public facilities has never been questioned as long as the fee is imposed equally on all users, and is a fair approximation of use or privilege of use, not excessive in comparison with the government benefit conferred. Neither is this constitutional doctrine unusual since these charges partake rather of the nature of a rent charged by the State based upon its proprietary interest in the public property rather than of a tax as that term is thought of in a technical sense.[25]

C. The Axle Tax Is Fairly Related To The Services Provided By The State.

In order to invalidate this type of State tax, Appellants must prove that the Axle Tax of $72 to $180 is excessive. Such levies have been upheld unless the amount is shown to be in excess of fair compensation for benefit of using State facilities. *Capitol Greyhound Lines*, *supra*. Moreover, the burden of asserting the requisite manifest disproportion rests squarely on anyone challenging the validity of the tax. *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); *Capitol Greyhound Lines*, *supra*.

Here, it is clear that the Axle Tax is not excessive in relation to the services it finances—indeed, Axle Tax revenues are paid into a dedicated fund used for bridge projects directly benefiting the vehicles taxed. Heavy vehicles—those subject to the Axle Tax—are a major cause of the deterioration which has necessitated the bridge improvement and replacement program. That

---

[25] Chapter 12, Exactions for the Use of Public Facilities and Services, Federal Limitations on State and Local Taxation. Paul J. Hartman, Professor of Law Emeritus at Vanderbilt University, Lawyers Cooperative Publishing Co., 1981, p. 665-666.

weight is a major factor in wear and tear on the highway cannot seriously be questioned. In fact, this Court has so held. In *Hicklin v. Coney*, 290 U.S. 169 (1933), the Court sustained a special user fee based on the carrying capacity, size and weight of trucks and specifically noted that carrying capacity—the size and weight of trucks—unquestionably had a direct relation to the wear and hazards of the highway. *Id.* at 173.

In-state registered trucks, as well as out-of-state registered trucks, need to use the State, county and municipal roads on which the bridges in question are located. These vehicles must use these routes to reach their destinations and to gain access to the federal interstate highways. Absent safe, usable bridges on these routes, the vehicles would be unable to pick-up, transport and deliver goods. J.A. 160, 184-187. This being the case, it is only fair that these vehicles be required to pay for the bridge projects which are essential to their continued operation in interstate commerce.

Most trucks, whether registered in-state or out-of-state, are not assessed more than $180; yet, even the $180 charge is well within the constant dollar amount of fees previously held valid by the Court. The $25 (1935 dollars) fee approved in *Aero Mayflower I*, *supra*, equates with $186.03 in 1983 dollars.[26] Yet, in 1935, the Georgia truck weight limit was only 12,500 lbs.[27] compared to Pennsylvania's current 80,000 lbs. In short, the approved fee in 1935 was for more money and substantially less privilege. Similarly, in 1950 the Capitol Greyhound company challenged Maryland's levies of $505.17, $580.00 and $372.55[28]; an equivalent 1983 flat

---

[26] The Consumer Price Index, (1967 = 100), was 40.1 in 1935 and 298.4 in 1983. U.S. Department of Labor Handbook of Labor Statistics, 1975, Reference Edition and Consumer Price Index, U.S. City Average 1975-1980.

[27] Ga. L. 1931 (Ex. Sess.), p. 114.

[28] *Capitol Greyhound Lines v. Brice*, *supra*, 339 U.S. at 546.

rate charge would have been $2,090.00, $2,400.00, and $1,542.00.[29]

A review of the record indicates that the trucking industry paid approximately 20% of the Commonwealth's expenditures for road maintenance and repair during the period April 1, 1981 through March 31, 1982. (Appendix 1a to this brief.) By contrast, heavy vehicles occasion the vast majority of road repair costs and cause higher road construction costs than would be the case if only cars used roads. J.A. 218-220. Although the Appellants contend that wear and tear on the highway system is only a function of miles driven, it is beyond credible dispute that carrying capacity, the size and weight of trucks unquestionably has a direct relation to the wear and hazards of the highway. *Hicklin v. Coney*, *supra*, 290 U.S. at 173.[30]

The Axle Tax is weight-related since it is a graduated charge relating to the number of the truck axles. All States have maximum load requirements. These requirements generally provide, that as vehicle weight increases, so does the number of axles. Therefore, the Axle Tax does vary with weight, the more axles on the vehicle, the more it pays. In addition, the Axle Tax also varies with mileage over the first 2,000 miles traveled in Pennsylvania over the course of a year. This prevents a situation in which a full tax is imposed on a vehicle having only *de minimis* contact with the State. Thus, not only is the Axle Tax by itself fairly related to the services provided vehicles using Pennsylvania highways—it is also part of a larger tax scheme which undercharges heavy vehicles for the use of the roads.

---

[29] The Consumer Price Index, in 1950 was 72.1; in 1983 the Consumer Price Index was 298.4, respectively.

[30] This Court has approved various non-mileage related highway user fees. See, *supra*, pp. 22-23, note 20 and related text.

D. The Market Fee Was Fairly Related To The Services Provided By The State.

The burden of asserting the requisite manifest disproportion clearly rests on the person challenging the validity of the tax. *Capitol Greyhound Lines v. Brice*, *supra*, 339 U.C. at 548; *Clark v. Paul Gray, Inc.*, *supra*, 306 U.S. at 599. But Appellants have made no attempt to establish that the $25 Marker Fee is excessive in relation to the benefit provided by the Commonwealth of Pennsylvania. In fact, the record directly refutes any such submission.

The Marker Fee is levied for the privilege of using State roads. J.A. 21. In order to extend the privilege of traversing its roads both to interstate and local traffic, Pennsylvania expended approximately $1.5 *billion* from April 1, 1981 through November 30, 1982 for highway construction and maintenance, State police protection and debt service. J.A. 29-30. Of this sum, motor carrier user fees received from vehicles subject to the Marker Fee totalled only $304 million (J.A. 38), and the Marker Fee itself yielded only about $12.5 million. J.A. 34. Although light weight vehicles used these roads too, it was heavy trucks such as those subject to the Marker Fee which necessitated significantly higher construction and maintenance costs. J.A. 30; *see also* J.A. 210-214. The record hardly demonstrates that the Marker Fee imposes a grossly disproportionate burden on interstate commerce. In fact, interstate carriers appear to have received a bargain.

It is interesting to note that the $25 fee is exactly the same amount upheld in *Aero Mayflower Transit Co. v. Georgia*, *supra*. In *Aero Mayflower* the charge was imposed for trucks with a weight limit of only 12,500 lbs. In 1981 and 1982, Pennsylvania imposed a similar $25 fee for trucks weighing 17,000 lbs. to 80,000 lbs. In terms of constant dollars, Pennsylvania's $25 charge is miniscule. For this same $25 fee, Appellants are re-

ceiving substantially more privilege than was granted in the Georgia case. As a result, it is clear that the Marker Fee is not unreasonable in amount and, therefore, satisfies the *Aero Mayflower* line of cases.

III. THERE IS NO REASON FOR THIS COURT TO RECONSIDER ITS PRIOR RULINGS THAT FLAT TAXES ON INTERSTATE COMMERCE ARE CONSTITUTIONAL.

Appellants suggest a number of reasons why this Court should reconsider prior rulings that flat taxes are constitutional. Those arguments are without basis.

Primarily, Appellants argue that this Court's decisions upholding flat taxes were based on assumptions which are no longer realistic. For example, they claim that the Court need no longer be concerned about the feasibility of administering graduated highway taxes because modern computers allow all States to utilize a variety of mileage-related highway taxes. App. Br. 42. This argument, however, misses the point in several respects.

As we have noted, and this Court has recognized, mileage is not the only "factor relevant in considering the fairness of compensation for road use." *Capitol Greyhound Lines v. Brice*, *supra*, 339 U.S. at 542. Rather, factors such as weight and size are equally important. *Ibid.* Thus, Appellants' contention that flat taxes must be discarded because records of mileage can now be accurately tracked on computers ignores that mileage, by itself, is not an accurate measure of road use or wear.

Secondly, Appellants' glib assertion that computers have eliminated all administrative problems is unsupportable. Computers can do nothing to ensure that the data which they process is accurate: garbage in still means garbage out. Enforcement of the requirement that mileage be accurately reported is still a complex and expensive endeavor. *See* J.A. 221-225. Thus, it is some-

what premature to argue that usage taxes based on mileage are so easy to administer that this Court should have no concerns about requiring such taxes. Certainly nothing in the record supports this contention.

Appellants also argue that existing mileage-related taxes provides a practical, nondiscriminatory alternative to the Axle Tax and Marker Fee. There is no factual basis for this argument in the record [31] and it is, in any case, irrelevant. The only support which Appellants do submit for this argument is the non-record experience in three other States. There is no evidence, however, that those States share Pennsylvania's terrain or weather problems, let alone its heavy volume of interstate travel.

Moreover, this Court has repeatedly held that States have broad discretion to design their own tax schemes. *Allied Stores of Ohio v. Bowers, supra*; *Commonwealth Edison Co. v. Montana, supra.* Certainly, a tax which is otherwise constitutional cannot be stricken simply because another alternative exists.

Finally, Appellants contend that Pennsylvania's flat taxes should be stricken because the adoption of such taxes by other States would impose a crippling cumulative burden on interstate motor carriers and has already provoked economic retaliation by other States. These arguments too are without factual foundation and are irrelevant. While citing hypothetical horror stories regarding cumulative burden, no such burdens are demonstrated. In any case, problems related to retaliation and cumulative burden are not limited to flat taxes. They can result from any kind of tax. A State tax which is

---

[31] Indeed, the evidence raises serious questions about Pennsylvania's ability to raise additional funds by raising existing taxes. In 1980, when Pennsylvania raised its registration fee, the number of trucks registered in Pennsylvania fell over forty percent. Thus, apparently, motor carriers have some ability to change their mode of operations to minimize State taxes. J.A. 188-192.

otherwise constitutional cannot become unconstitutional because of the actions of other States.

To the contrary, as Pennsylvania has already argued before this Court (as *amicus*), it is retaliatory taxes which are unconstitutional. *Arkansas v. Oklahoma*, No. 95 Orig. (O.T. 1984). Such taxes violate the Commerce Clause in at least two respects. First, because they are imposed only on out-of-state trucks, they clearly discriminate against interstate commerce.[32] In addition, they fail the "fair relationship" test since they are not even arguably related to the costs of providing services. Rather, their imposition, and generally their amount, depend solely upon the amount of a tax imposed by another State. *See, e.g.*, 47 Okla. St. Ann. § 22.5j(K) (Supp. 1983).

As this Court has recognized, Congress is the appropriate body to solve those problems which Appellants purport to submit to this Court. "[I]f a new rule prohibiting taxes [on flat rates] . . . is to be declared, we think Congress should do it." *Capitol Greyhound Lines, Inc. v. Brice, supra*, 330 U.S. at 547 (footnote omitted). "Under our federal system, the determination [of tax measures] is made by state legislatures in the first instance and, if necessary, by Congress, when particular state taxes are thought to be contrary to federal interests." *Commonwealth Edison Co. v. Montana, supra*, 453 U.S. at 628.

Flat fees imposed by States on interstate motor carriers, including vehicle registration fees, have a long history. If a change is to be made, it should be by Congress.

---

[32] While this Court has held that retaliatory taxes do not violate the Equal Protection Clause, it has explicitly left open the possibility that such taxes are unconstitutional under the Commerce Clause. *Western and Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 671 (1981).

As Justice Black stated in his famous dissent:

> Since the present litigation has developed that no such unfair burdens have been imposed upon the Appellant's interstate business, Appellant can only be exempted from payment of this tax by the application of a regulatory rule or law which condemns all such state taxes—whether fair or unfair. If such a rule or law is to be promulgated, it would seem that under our constitutional division of governmental powers, such a regulatory policy should be considered and determined by Congress under its exclusive grant.
>
> • • • •
>
> With the wisdom of such fiscal policy of a state, we are not concerned. The interest of interstate commerce will best be fostered, preserved, and protected—in the absence of direct regulation by Congress—by leaving those engaged in the various states subject to the ordinary and non-discriminatory taxes of the states from which they receive governmental protections.

J. D. Adams Manufacturing Company, 304 U.S. 307, 332-333 (1933) (Black, J., dissenting).

Prior decisions of this Court are entitled to considerable "respect" as reflected in the doctrine of *stare decisis*. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 419-420 (1983). A consistently applied rule of law can be overruled only if it is clearly demonstrated that it was plainly incorrect and it has engendered significant problems which can be corrected only if the rule is changed. *See Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272-273 (1980); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 404-405 (1970). As we have discussed, Appellants have failed to demonstrate either that the flat fee cases are wrong or that they have created far-reaching difficulties. Moreover, interstate commerce problems are particularly within the expertise and power of Congress to solve. This

Court should decline Appellants' invitation to reverse the long line of flat fee cases.

IV. IF THIS COURT RULES THAT THE PENNSYLVANIA SUPREME COURT ERRED AS A MATTER OF LAW, IT SHOULD REMAND THE MATTER TO THAT COURT FOR FINAL DISPOSITION.

Even if this Court rules that the Pennsylvania Supreme Court erroneously entered judgment in favor of the Commonwealth, it should remand this case to that Court for final disposition. This is because there are issues of fact and State law which must be resolved by State courts before final disposition of this case.

A. Unresolved Factual And Evidentiary Issues Preclude Final Judgment In Favor Of Appellants.

1. It is not at all clear, as a factual matter, that the State in which a truck is registered has anything to do with the nature of the commerce in which it is engaged for purposes of the Commerce Clause. The vast majority of heavy trucks registered in Pennsylvania travel a substantial portion of their mileage outside of Pennsylvania, and are owned by firms engaged in business outside as well as in the Commonwealth. J.A. 192. Those firms are generally free to choose the State in which they will register their trucks. J.A. 188-192. Those trucks, therefore, clearly participate in "interstate commerce" in the traditional sense.

Moreover, many trucks which are registered outside of Pennsylvania receive the benefit of the decrease of the registration fees which accompanied the imposition of the Axle Tax because their State of registration participates in the Interstate Registration Plan. Under that plan, they pay a portion of Pennsylvania's registration fee, based upon that proportion of their total miles of travel which are travelled in Pennsylvania. J.A. 38-40. Accordingly, when Pennsylvania's registration fee is decreased, their total obligation for registration fees falls.

Properly viewed, then, many interstate truckers benefited from Act 234 whether or not they were registered in Pennsylvania. Thus, the degree to which "interstate commerce" as a whole was adversely affected by the Axle Tax and Marker Fee involves subtle questions of fact which have not yet been resolved. These issues are properly left for the State courts.

2. If the Court agrees with Appellants' argument that interstate commerce includes all trucks not registered in Pennsylvania which are liable for the Marker Fee or Axle Tax, an evidentiary issue still remains which should be resolved by the State courts. Specifically, Appellants' argument that the Axle Tax and Marker Fee discriminate against interstate commerce because they bear more heavily on a per mile basis on trucks not registered in Pennsylvania is based almost entirely on a survey which was a compilation of out-of-court statements collected by the Appellant trade association from its members. While the survey was admitted by the trial court over objection, it was not relied on by that Court in reaching its decision. Nor was its admissibility, which Appellees contested, considered by the Pennsylvania Supreme Court.

Undisputed testimony demonstrated that the survey had not been conducted in accordance with professional standards and had no other indicia of reliability. J.A. 82-84. To the contrary, the survey included no sample, representative or otherwise, but rather, included information supplied by whoever happened to respond. The person who designed and conducted the survey was neither an expert nor even neutral with respect to the subject matter. The design, questionnaires, and interviewing techniques all failed to meet professional standards. The supervisor of the survey, the interviewers and respondents all knew both the purpose of the survey and of the litigation in which it was to be used. *Ibid.* Thus, the survey would not meet the test for admissibility under Rule 803 of the Federal Rules of Evidence and would be

equally inadmissible in State court. Certainly, admissibility in State court should be resolved by the highest State court, especially when that issue is, under Appellants' theory, critical to a decision on the constitutionality of a State statute.

3. While Appellants purport to find other support in the record for their allegations that a typical truck registered in Pennsylvania drives more miles on Pennsylvania's highways than trucks registered in other states (App. Br. 33-34), the evidence is far from conclusive. For this proposition, Appellants cite an informal survey done by Pennsylvania's Department of Transportation in 1979. App. Br. 33-34. That survey, however, predates the initial increase in registration fees which caused many trucks to register outside Pennsylvania. Thus, when it was taken, in 1979, a much higher percentage of trucks operating in Pennsylvania were registered in Pennsylvania than in 1981, the year from which Appellants take their truck registration figures. *See.* J.A. 74, 89, 104. Thus, Appellants' comparison of the percentage of trucks registered in Pennsylvania in 1981 (allegedly 25%) to the percentage of miles driven on Pennsylvania's highways by heavy trucks registered in Pennsylvania in 1979 (allegedly 65%) is wholly invalid.

In any case, the 1979 survey was based on a wholly inadequate sample and, like Appellants' own survey, was the subject of various objections in the Courts below. J.A. 47, 84. Its admissibility, like that of Appellants' survey, should be determined by the State Courts.

Appellants also note that Pennsylvania registered trucks drive a higher percentage of their total miles in Pennsylvania than those registered out-of-state. That comparison says nothing, however, about actual miles travelled. To the contrary, the exhibit referred to by Appellants demonstrates that Pennsylvania registered trucks travelled fewer than thirty percent of all miles of travel in Pennsylvania (.651 billion miles travelled by

trucks registered in Pennsylvania/2.212 billion total Pennsylvania miles). J.A. 169-171. This percentage fairly relates to number of vehicles, 131,000, registered in Pennsylvania in 1981 as opposed to those registered elsewhere which travelled in Pennsylvania, 399,000. J.A. 89.

We do not contend that these numbers are any more accurate than those suggested by Appellants in their brief. To the contrary, they demonstrate again that the evidence is far from conclusive. Clearly, the discrepancies and the related evidentiary questions should be resolved by the State Courts. Accordingly, even if this Court finds that flat taxes must be precise under the Commerce Clause, this matter should be remanded to the Pennsylvania Supreme Court to determine whether, in fact, the Axle Tax and Marker Fee bear more heavily on interstate commerce.[33]

B. The Axle Tax Involves A Severability Question Properly Addressed By The State Court In The First Instance.

In addition, a decision that Act 234 of 1982 is unconstitutional because it effectively relieves Pennsylvania registered trucks of the burden of the Axle Tax by simultaneously lowering their registration fees raises an issue of statutory construction which should be resolved by Pennsylvania courts. Specifically, under State law, statutory provisions are presumed to be severable. 1 Pa. C.S.A. § 1925. Thus, the question arises as to which

---

[33] On the other hand, if this Court agrees with us that the relevant inquiry, under *Maryland v. Louisiana*, is whether a State's taxing scheme taken as a whole discriminates against interstate commerce, the survey is irrelevant. Rather, the survey purports to evaluate only the burden of the Marker Fee viewed in isolation. Indeed, it was neither offered nor admitted in the Axle Tax litigation. Thus, Appellants cannot rely on that survey with regard to the Axle Tax or any argument that Pennsylvania highway user taxes, viewed as a whole, discriminate against interstate commerce.

provision is unconstitutional and must be voided: the provision imposing the Axle Tax equally on all heavy vehicles or the provision which lowered the registration fee, supposedly exempting domestic commerce from the effect of the Axle Tax. The issue is clearly one of legislative intent which should be decided by the Pennsylvania courts.[34] Accordingly, even if this Court finds that the Axle Tax improperly discriminates against interstate commerce by exempting domestic commerce from its effect, this matter should be remanded to the Pennsylvania Supreme Court to determine the appropriate remedy.

C. The State Court Should Decide Whether A New Rule Against Flat Fees Should Be Applied Prospectively or Retroactively.

Finally, if the Court determines that flat rate fees on motor carriers are no longer permissible and that the *Aero Mayflower* line of cases must be overruled, it by no means follows that this rule must be applied retroactively to require refunds by Pennsylvania which will amount to as much as $400 million. "[T]he Constitution neither prohibits nor requires retrospective effect." *Linkletter v. Walker*, 381 U.S. 618, 629 (1965). Quite simply, "the federal constitution has no voice upon the subject." *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932).

Questions of retrospective versus prospective application are resolved by considering the forseeability of the

---

[34] Of course, we urge that if this issue is reached, here or in the State courts, the provision lowering the registration fee should be voided. First, as noted, the Axle Tax was imposed equally on all trucks and is, therefore, neutral. If there is a discrimination, it is in the lowering of the registration fee. Second, the issue is one of legislative intent and, certainly, it cannot credibly be argued that Pennsylvania's legislature would want an interpretation of this statute which left a major bridge renovation project without funding.

new rule, whether the purpose of the new rule would be advanced by retrospective application, and the inequalities which retroactive application may produce. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971). Because this case comes to the Court from a State court and because there may be matters not of record which bear on the question of retrospective application, the best course would be to remand the case to the State courts for resolution. This result is particularly appropriate here both because it may influence, or be influenced by, the severability question discussed earlier and because the question is not a constitutional one.

Should the Court choose to consider the issue, it is plain that retroactive application would be inappropriate here. Non-mileage related flat fees have been approved by this Court no less than 12 times between 1916 and 1978.[35] States like Pennsylvania, which have predicated enormous highway projects on their ability to collect fees like those approved in prior cases, had no reason to suspect that their revenue scheme was infirm.

If the purpose of prohibiting flat taxes is to foster the free flow of commerce, it is difficult to see how a refund of tax collections will further that purpose. Commerce apparently continued to flow over Pennsylvania roads while these taxes were in force and refunds will do nothing to retroactively free Appellants from whatever constraints they have operated under.

The inequity of applying an adverse decision retroactively are staggering. The Axle Tax, which represents the lion's share of the revenues at issue here, was enacted to pay for a billion dollar bridge repair and replacement program. This program is substantially under way,

---

[35] This list includes the *Aero Mayflower, supra*, line of cases, which were reaffirmed in *Evansville, supra*, and *Massachusetts v. U.S., supra*, and also includes the graduated user fee cases, beginning with *Hendrick v. Maryland, supra*. *See*, p. 22.

expending $55,000,000-$75,000,000 annually. This has already resulted in the upgrading of numerous bridges, which need repair to accommodate the heavy loads carried by Appellants and others in their business. To refund these enormous sums would strain the treasury beyond its limits, while Appellants would continue to reap the benefits of an improved highway system. The balance tilts heavily in favor of prospective application only.[36]

---

[36] In stipulations filed in the trial court, Appellees agreed to a procedure for expedited refunds should Appellants "prevail upon the merits." J.A. 111, 151. The stipulation was essentially procedural in nature in relieving Appellants from the obligation to file numerous individual requests for refunds. *See* Pa. Stat. Ann. tit. 72, § 503 (Purdon 1949 & Supp. 1986). Rather than promising refunds irrespective of Appellants' entitlement under State law, the stipulations merely were reflective of a State statute which makes refunds available if the law imposing the tax is declared unconstitutional. Pa. Stat. Ann. tit. 72, § 503 (Purdon 1949 & Supp. 1986); *see* J.A. 111-112, 151. This is reinforced by the specific reservation in the stipulations of all defenses. J.A. 113, 152. The question of retrospective versus prospective application, in our view, is tied inextricably to the merits of the case and the stipulation was not intended to preclude the result urged in the text. In any event, the question whether the refund statute requires a refund in all cases is a matter of State law properly addressed by the State courts in the first instance.

CONCLUSION

The judgment of the Supreme Court of Pennsylvania should be affirmed, or, alternatively, this case should be remanded to the Supreme Court of Pennsylvania for further proceedings as are appropriate.

Respectfully submitted,

LEROY S. ZIMMERMAN
Attorney General

SUELLEN M. WOLFE
Chief Deputy Attorney General
Counsel of Record

ANDREW S. GORDON
Chief Deputy Attorney General

BRYAN E. BARBIN
MICHAEL A. ROMAN
Deputy Attorneys General

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-1460

Of Counsel:
ALLEN C. WARSHAW
DUANE MORRIS & HECKSCHER
240 N. 3rd Street
Harrisburg, PA 17108

APPENDIX

Compilation of Cost and Benefits 4/1/81-3/31/82

Trucking Costs

Charges Imposed On Pa. Registered Trucks Permits, Titles, Registration Fees

(J/A, P. 35, ¶ 80)	Special Hauling Permits	4.8	
(J/A, P. 35-36, ¶ 82, 84)	Title Fees	5.8	
	Registration Fees	48.5	
(J/A, P. 36, ¶ 86 & 88)	.5 Transfer Fees		
(J/A, P. 34, ¶ 72)	14.3 Single Trucks		
(J/A, P. 34, ¶ 74)	26.7 Truck Tractors		
(J/A, P. 35, ¶ 77)	7.0 Trailers		
	Total		59.1

Charges Imposed on Non Pa. Registered Trucks

(J/A, P. 35, ¶ 76)	IRP Registration Fees	5.0	
(J/A, P. 34, ¶ 70)	Marker Fee	10.8	
	Total		15.8

Charges Imposed On Both

(J/A, P. 33, ¶ 67)	Fuel Use and Liquid Fuels	79.1	
(J/A, P. 34, ¶ 70)	Motor Carrier Road Tax	5.8	
(J/A, P. 37, ¶ 92)	Gross Receipts Tax	.3	
(J/A, P. 37, ¶ 97)	Oil Company Franchise Tax	22.5	
	Total		107.7
	TOTAL HIGHWAY USER FEES		182.6

Motor License Fund Expenditures

	Highway Maintenance	525.0	
(J/A, P. 29, ¶ 47)	Highway Construction	79.7	
	State Police	104.2	
	Debt Service—Principal	63.6	
	Debt Service—Interest	105.4	
TOTAL MOTOR LICENSE FUND EXPENDITURES			877.9

---

* Marker fee revenues were generated solely from trucks registered out of state. $25 marker fee was deemed paid by Pa. registered trucks as part of their $45-228 increases in registration fees.